(16)

Supreme Court, U.S.
FILED
JUN 17 1998
OFFICE OF THE CLERK

No. 97-1121

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CITY OF CHICAGO,
Petitioner,
v.
JESUS MORALES, *et al.*,
Respondent.

On Writ of Certiorari to the Illinois Supreme Court

AMICUS CURIÆ BRIEF ON THE MERITS IN SUPPORT OF THE CITY OF CHICAGO BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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Amicus curiæ, Gil Garcetti, District Attorney for the County of Los Angeles, State of California, files this brief as the authorized law officer of the county, pursuant to the Court's Rule 37.4.[1]

1. Los Angeles County Charter § 25 (1995) states:
"Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this Charter, as to such officer, Board or Commission."
It is provided in the California *general law* that:
"The district attorney is the public prosecutor, except as otherwise provided by law.
"The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." Cal. Government Code, § 26500 (West 1988).

INTEREST OF AMICUS CURIÆ

Nearly one fourth of the murders recently committed in California have been blamed on members of criminal street gangs. Cal. Gangs by the Next Millenium, at 7 (Cal. Dept. of Just., 1998). Figures maintained by the Los Angeles Police Department reflect that, in 1997 in the City of Los Angeles, more than a third of the criminal homicides were committed by members of criminal street gangs.[2] County-wide in Los Angeles County, the figures are even more alarming.[3] In 1990, the California Legislature declared that Los Angeles County led the nation in number of gang members.[4] Figures compiled by the Los Angeles County Sheriff now show that the county population includes more than 150,000 members of 1350 criminal street gangs.[5] The District Attorney bears the major

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2. See footnote 8, *post*.

3. Figures provided through the Hardcore Gang Division of the Los Angeles County District Attorney's Office from Captain James Mulvihill of Operation Safe Streets (OSS), the gang enforcement unit of the Los Angeles County Sheriff's Department, show that, in 1997, 42% of homicides in Los Angeles County were gang-related. Captain Mulvihill obtained the figures from GREAT, a Los Angeles County-wide computer database maintained by OSS under Captain Mulvihill's supervision. All police agencies in Los Angeles County input information into GREAT. The database is maintained for the use of law enforcement agencies.

4. Chapter 3.5, entitled "Gang Violence Suppression," of part 4, title 6 of the California Penal Code (West 1992), contains a number of findings, including this statement:

> "The Legislature hereby finds and declares the following:
>
> " . . . .
>
> " (4) Los Angeles currently leads the nation in the number of gang members and gang sites, the consumption of drugs, the amount of drugs confiscated, drug-related violent crimes, and has the greatest number of young people between 6 and 18 years of age who are 'at risk.'" Cal. Penal Code, § 13826.11(a)(4) (West 1992).

5. These figures were also obtained through GREAT. See fn. 3, *ante*.

responsibility in prosecuting gang members for crimes they commit in Los Angeles County.[6]

The District Attorney employs a special unit, with partial federal funding, designated to prosecute only crimes committed by hardcore gang members. See Cal. Penal Code, §§ 13826-13826.4, 13826.7 (West 1992, West Supp. 1998). Under California general law:[7]

> "The district attorney may sponsor, supervise, or participate in any project or program to improve the administration of justice." Cal. Government Code, § 26500.5 (West 1988).

Under this power, the district attorney has initiated and actively pursues county programs to reduce crime and turn youngsters from criminal careers. Thus, the district attorney has a special interest in an ordinance that requires the police to disperse loitering groups that include gang members likely to be involved in criminal activity.

The district attorney's mission includes an "obligation to enhance the fundamental right of the people of Los Angeles County to a safe and just society." Legal Policies Manual, *Mission Statement of the District Attorney's Office* (Los Angeles Co. Dist. Atty., 1998). Ordinances similar to § 8-4-015 of the Municipal Code of Chicago (added June 17, 1992) would, if adopted by municipalities in Los Angeles County, enhance this right of the people of the county by reducing more serious criminal activity. The district attorney believes the Constitution permits implementation of the Chicago ordinance and has an interest in a decision from the Court upholding the ordinance.

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6. See footnote 1, *ante*.

7. See footnote 1, *ante*.

SUMMARY OF ARGUMENT

The Chicago ordinance is a constitutionally enforceable statute aimed at a particular evil, namely, loitering criminal street gangs--gangs that suck the vitality from the city's neighborhoods and public places and personally intimidate its citizens. In *Griffin* v. *Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), the Court recognized the existence of "'special needs' beyond normal law enforcement," *id.*, 483 U.S. at 873-874, that may constitutionally impinge upon rights normally given greater protection by the Court. But the threat that criminal street gangs present to public safety and the quality of life in neighborhoods in Chicago necessitates dispersal of loitering gangs of street criminals in situations only where the Court has otherwise been protective of rights "not mentioned in the Constitution or in the Bill of Rights." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

Despite the Illinois Supreme Court's contrary pronouncement, the Chicago ordinance does not make loitering a crime; the operative paragraph of the ordinance consists of a sentence imposing upon a police officer a duty to issue an order dispersing loitering gang members and associates, and a second sentence making a crime only of failure to obey the police order. See Chicago Muni. Code, § 8-4-015(a). The Constitution permits prosecution under the second sentence, assuming the lawfulness of the order, see *Cox* v. *Louisiana*, 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 417 (1965); and the special need to preserve public safety and improve the quality of life for the community justifies imposing such a duty upon the police. No person subject to such an order need fret over the meaning of the word *loiter*--prosecution results only from failure to disperse on order of the police. And no police officer initiating such an order will have a very difficult time identifying a group subject to such an order--members of criminal street gangs notoriously advertise their membership to effect the gang's purposes. See, *e.g.*, *People* v. *Gardeley*, 14 Cal.4th 605, 613, 59 Cal.Rptr. 356, 927 P.2d 713 (1996).

The Chicago ordinance provides an attractive alternative to the injunctive process currently utilized by some California municipalities as a means of curbing the criminal street gang menace. See, *e.g.*, *People ex rel. Gallo* v. *Acuna*, 14 Cal.4th 1090, 60 Cal.Rptr.2d 277, 929 P.2d 596 (1997). Such an ordinance and anti-gang injunctions may also usefully supplement one another.

ARGUMENT

I. THE ORDINANCE'S FIRST SENTENCE ESTABLISHES A POLICE DUTY

The operative subsection of the Chicago ordinance contains but two sentences. The first states:

> "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more persons, he shall order all such persons to disperse and remove themselves from the area." Chicago Muni. Code, § 8-4-015(a).

Another subsection defines *criminal street gang*:

> "[It] means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." *Id.*, § 8-4-015(b)(2).

Subsection 8-4-015(b)(3) contains a list of crimes mostly involving violence and narcotics trafficking. Thus, the ordinance imposes a duty upon Chicago police officers, who shall order dispersal and removal of certain loitering persons reasonably likely to be involved in serious criminal activity, i.e., any person loitering in a group reasonably believed to include a criminal street gang member.

II. THE ORDINANCE CONSTITUTIONALLY IMPOSES AND DEFINES THE DUTY

A. The Evil Is Real

As the Illinois Supreme Court here observed:

> "Criminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." *City of Chicago* v. *Morales*, 177 Ill.2d 440, 227 Ill.Dec. 130, 687 N.E.2d 53, 64 (1997).

That court agreed the "problem" requires abatement. *Id.*, 687 N.E.2d at 64. Clearly, it does when one considers figures, such as those supplied by the Los Angeles Police Department, indicating that in 1997, members of criminal street gangs were responsible for more than a third of the criminal homicides committed in the City of Los Angeles.[8]

But the issue is not solely public safety; it includes the community's quality of life--the activities of criminal street gangs in a neighborhood can result in the residents becoming "prisoners in their own homes." *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1100. Such was the case, as recently described by the California Supreme Court, in the San Jose neighborhood of Rocksprings:

> "Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents'cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights

8. The actual percentage for 1997 was 33.6. Detective Paul Glasgow of the Los Angeles Police Department provided this percentage based upon official records he maintains for that department's Detective Support Division. The same records show that in 1996, gang members committed 37.7% of that city's homicides and, in 1995, 45.2%.

> and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti. [¶] The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains about the gang's illegal activities or tells police where drugs may be hidden." *Ibid.*

The appendices attached to the petition for certiorari reflect a concern of the lower Illinois courts that the Chicago ordinance would apply when a social worker or a family member is talking to a gang member. (See App. B, at 27a.) But such concerns pale when, as here (and in, *e.g.*, Rocksprings, see *ante*), the intimidation and control of a neighborhood by criminal street gangs is the evil sought to be remedied. The presence of a gang member's relative or social worker among those loitering outside a residence or business or in an apartment parking area adds nothing to the comfort level of law-abiding neighbors. See, *e.g.*, *People* v. *Green*, 31 Cal.App.4th 1001, 1007, 38 Cal.Rptr.2d 401 (1995) (gang members "sprayed a populated intersection with

bullets" in gang retaliation shooting); but see *People* v. *Franco*, 24 Cal.App.4th 1528, 1534, 30 Cal.Rptr.2d 478 (1994) (gang members decide not to shoot rival gang member with his mother and aunts "because [he] was walking with grown ladies").

Chicago has a vital interest in the quality of the life of its citizens. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Section 8-4-015 of its municipal code protects that interest.

B. The Operational Standards In The Ordinance Are Constitutionally Drawn

1. Establishing a reasonable belief that a person belongs to a criminal street gang is practicable

Generally, members of criminal street gangs are readily susceptible of identification. The Chicago Police Department's guidelines for enforcement of the instant ordinance demonstrates the methodology. As reflected therein, the police department maintains a Gang Information File, for the purpose of identifying gangs and gang members. See Chicago P.D. General Ord. No. 92-4, § III.A. (1992). Gang members are frequently identified through their own admissions of membership. See, *e.g.*, *People* v. *Louen*, 17 Cal.4th 1, 6, 69 Cal.Rptr.2d 776, 947 P.2d 1313 (1997); *People* v. *Gardeley*, *supra*, 14 Cal.4th at 611, 612, 620.[9] Indeed, advertisement of gang membership is a useful part of the

9. However, in a chapter entitled Street Elite, Professor Katz has noted: "An inside joke that has been shared by field investigators over several decades is that subjects freely refer to their enemies as members of gangs but instruct an observing sociologist that their collective commitment is to a 'club,' an 'organization,' a 'clique,' a 'barrio,' a 'mob,' a 'brotherhood,' a 'family,' an ethnic 'nation,' a 'team,' or a 'crew.' Often, they expressly deny membership in a 'gang.'" J. Katz, Seductions of Crime, at 115 (Basic Books, 1988).

See also *People* v. *Munoz*, 157 Cal.App.3d 999, 1010-1012, 204 Cal.Rptr. 271 (1984) (trial court requires prosecutor's cross-examination on gang membership to omit use of the word *gang*).

intimidation involved in controlling a neighborhood, or may assist in maintaining gang membership. See *Gardeley*, 14 Cal.4th at 613.[10]

> "[T]he 'expressive' aspect of gang violence involves impulsive and emotional defense of one's identity as a gang member, defense of the gang and gang members, defense and glorification of the gang's reputation, and recruitment of gang members." J. Howell, *Youth Gang Drug Trafficking and Homicide: Policy and Program Implications*, 4 Juv. Just. No. 2, p. 14 (Dept. of Just., 1997).

Clothing, tatoos or other markings are often gang-specific, as are signals between members.[11] See, *e.g.*, *People* v. *Louen*,

10. In *Gardeley*, the California Supreme Court summarized a portion of the testimony of a police gang expert, as follows:

> "Detective Boyd explained: It is common practice for several gang members acting in concert to assault a person in full view of residents of an area where the gang sells drugs. Such attacks serve to intimidate the residents and to dissuade them from reporting the gang's drug-dealing activities to police. Gang members typically view a dispute or argument with someone who is not a member of the gang as a 'challenge' to the gang's authority, and they respond by trying to 'dominate' the person physically, that is, they might 'beat the person senseless, throw rocks over his head, kick him' and do this 'where a lot of people can witness it.' When gang members 'terrorize people . . . [who] have to live there,' the 'fear factor' allows the gang to 'go right back to dope dealing' day after day in the same area." *People* v. *Gardeley*, *supra*, 14 Cal.4th at 613.

Professor Katz describes the gang practice of *parading* as "a process of walking in apparent unison past a relatively stationary public while displaying 'colors' or other insignia of membership in a diffusely threatening group," J. Katz, *op. cit. supra*, 142, or "when members pace about a public location, gesturing defiance and shouting insults at will." *Id.* at 143. Professor Katz further notes "that the mass media's coverage of 'gang activities' is a powerful stimulus to members' involvement." *Id.* at 144.

11. The name of a gang on a t-shirt contributed evidence of gang membership in *People* v. *Gamez*, 235 Cal.App.3d 957, 963, 286 Cal.Rptr. 894 (1991), disapproved on a legal issue in *People* v. *Gardeley*, *supra*, 14 Cal.4th at 624, fn. 14. Professor Katz states:

(continued...)

supra, 17 Cal.4th at 6. Reliable information from a third party may also identify a gang member.

Given the wealth of objective criteria, the courts can easily test a police decision to issue a dispersal order on a case-by-case basis. Absent the existence of any such objective criteria, the police could hardly justify such an order; the presence of objective criteria should justify it. Cf. *Whren* v. *United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Of course, upon consideration of the statutory defense, see Chicago Muni. Code, § 8-4-015(b), the final decision on whether a member of the loitering group actually belongs to a criminal street gang is, as are similar questions in any criminal prosecution, a question for the trier of ultimate fact. See, *e.g.*, *People* v. *Gamez*, *supra*, 235 Cal.App.3d at 980, opn. of Wallin, J., conc. in the result.

2. **The ordinance constitutionally discourages remaining in a public place (1) with a criminal street gang member *only* when done with no apparent purpose and (2) with no apparent purpose *only* when with a criminal street gang member**

The ordinance defines *loiter* as "to remain in one place with no apparent purpose." Chicago Muni. Code, § 8-4-015(c)(1). The

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11. (...continued)

". . . West Coast barrio warriors (and some black groups as well) use the strikingly simple sartorial device of an upturned bill on a cap to signify membership in a 'bad' group. The barrio name is commonly painted on the underside of the brim, and circular letters in the barrio's name frequently are drawn and punctuated to suggest eyes. When turned up, the bill of the cap has the 'bad' youth peering down on passers-by with a collective identity drawn from underneath." J. Katz, *op. cit. supra*, 136-137.

Professor Katz is a sociologist. Presumably, a city police officer could provide a variety of indicia of gang membership appropriate to local criminal street gang cultures. Cf., e.g., *People* v. *McDaniels*, 107 Cal.App.3d 898, 904, 166 Cal.Rptr. 12 (1980) (Los Angeles Co. Dep. Sheriff made effort as part of his duties "to study the social customs, methods of operation of gangs in south central Los Angeles").

first sentence of § 8-4-015(a), which creates the police duty, uses the word *loitering*, as thus defined. Accordingly, the ordinance discourages (1) remaining in a public place with a criminal street gang member, *only* when done with no apparent purpose and (2) remaining in a public place with no apparent purpose *only* when with a criminal street gang member. Thus, so far as the Chicago ordinance is concerned, one can loiter with impunity so long as not in the company of a member of a criminal street gang. And, at least under the ordinance, when a purpose is apparent, one can remain in a public place with a member of a criminal street gang without police interdiction.

As a practical matter, to avoid a police dispersal order, persons who wish to remain in a public place ***with a person whom the police reasonably believe to be a member of a criminal street gang*** may make their purpose apparent upon contact with the police.[12] The importance of abating the "expanding cancer," *City of Chicago* v. *Morales*, *supra*, 687 N.E.2d at 64, justifies that inconvenience. Cf. *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 450, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (justifying governmental interference with freedom of movement vis-a-vis, here, the freedom to loiter). The purpose thus made known, the ordinance provides no further justification for police action.

By requiring police to disperse only loiterers who belong to and associate with criminal street gangs, the Chicago ordinance addresses itself to a narrow group of persons whose loitering, under the City Council's findings (and also apart from them), saps the city's neighborhoods of vital strength. With this limitation, the Chicago ordinance distinguishes itself from anti-loitering statutes held unconstitutional by the Court. Cf. *Boos* v. *Barry*, 485 U.S. 312, 331-332, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (restriction of anti-congregation statute to "groups posing a

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12. In addition, assuming any prosecution after disobedience to an order to disperse, it is an affirmative defense to the charge that no one in the group belonged to a criminal street gang. Chicago Muni. Code, § 8-4-015(b).

security threat," 485 U.S. at 331, satisfies 1st Amend.); *Colten* v. *Kentucky*, 407 U.S. 104, 110, 92 S.Ct 1953, 32 L.Ed.2d 584 (1972) (conviction under statute punishing disobedience of dispersal order when congregating in public place with "intent of causing inconvenience, annoyance or alarm," *ibid*., withstands 1st and 14th Amends.).

III. THE ORDINANCE'S SECOND SENTENCE PLAINLY CREATES A CRIME RESULTING FROM REFUSAL TO OBEY A POLICE OFFICER'S ORDER TO DISPERSE

"[T]here is no place for violence in a democratic society dedicated to liberty under law . . . ." *Cox* v. *Louisiana*, 379 U.S. 559, 574, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

> "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox* v. *Louisiana*, *supra*, 379 U.S. 536, 554.

The violence inflicted upon society by the presence of criminal street gangs cannot credibly be denied. It is in part to avert such violence that the Chicago City Council approved § 8-4-015, requiring the police to order dispersal of loitering members and associates of such gangs. But an unenforceable order could hardly serve the purpose. Accordingly, the second sentence of the operative portion of the Chicago ordinance states:

> "Any person who does not promptly obey such an order is in violation of this section." Chicago Muni. Code, § 8-4-015(a).

Thus, while the first sentence of subsection 8-4-015(a) creates a police duty to dispel certain loitering, the second generally makes refusal to obey the order a crime. The elements of the crime are: (1) a police order to disperse and remove from an area, and (2) failure to promptly obey. It is in the ordinance, however, explicitly a defense that none of the disobedient loiterers belonged to a criminal street gang. § 8-4-015(b).

In *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), the Court in dicta described an ordinance that made it an offense "to refuse or fail to comply with any lawful order, signal or direction of a police officer" as "so broad as to evoke constitutional doubts of the utmost gravity." 382 U.S. at 93. In making this statement, the Court in *Shuttlesworth* referred to a portion of its opinion concerning another part of the same statute, in which the Court cited to the concurring portion of an opinion of Justice Black in *Cox* v. *Louisiana*, *supra*, 379 U.S. 536, 559, 579. But in *Cox*, the Court had under review another ordinance, the violation of which consisted of two elements, and a majority of the Court described the second element--consisting of "a refusal to move on after having been ordered to do so by a law enforcement officer," *id*. at 551--as "narrow and specific," *ibid*., and, thus, presumably constitutionally drawn. See *ibid*.

While the Illinois Supreme Court stated below, "The ordinance seeks to criminalize acts of 'loitering' in a public place," *City of Chicago* v. *Morales*, 117 Ill.2d 440, 687 N.E.2d 53, 60 (1997), the ordinance does no such thing; to say that it does reveals a failure to read fairly its plain language. The ordinance does not make a crime of *loitering*;[13] it does make a crime of the failure to obey the dispersal order of a police officer. While the Illinois court erroneously felt *loiter* an inadequate term "to inform a citizen of its criminal implications," 687 N.E.2d at 61, any citizen subject to such a police order need not reflect at all upon the word *loiter* or its definition in the ordinance; the criminal act is in the refusal to obey the order. Cf. *City of Houston* v. *Hill*, 482 U.S. 451, 463, n. 11, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); *Colten* v. *Kentucky*, *supra*, 407 U.S. at 110.

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13. The Illinois Supreme Court notes elsewhere in its opinion that, "literally read, the gang loitering ordinance does not prohibit loitering with a criminal street gang member," *City of Chicago* v. *Morales*, 687 N.E.2d at 62, although that court uses this statement merely to emphasize that what is at issue is not actual gang membership, but a police officer's "reasonable belief that one person in a group of loiterers is a gang member." *Ibid*.

IV. A POLICE ORDER UNDER THE CHICAGO ORDINANCE ADDRESSES LOITERING THAT IS PARTICULARLY PROVOCATIVE OF VIOLENCE

The evident purpose of the Chicago ordinance may be gleaned from its plain language. The purpose has to do not with encouraging arrests and prosecutions, but with dispersal of loitering street gang members and their associates, distinguishing it from the ordinance under review in *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S. 156. The Chicago ordinance seeks prevention by removing a likely source/target (see *post*) of criminal activity and neighborhood blight. While the Court in *Papachristou* described loafing and loitering, *themselves* arrestable and prosecutable under the Jacksonville (but not the Chicago) ordinance, as "historically part of the amenities of life as we have known them," *id.*, 405 U.S. at 164, surely those amenities must be afforded to the law-abiding citizenry and not just to gang members; but in Los Angeles and San Jose, as in Chicago, the threatening presence of the latter persuades the remainder of the citizenry to stay indoors. See, *e.g.*, *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1100.

The Chicago City Council gave reasons for imposing this dispersal duty on the police: (1) an increase in the city's murder rate and other violent crimes, and in drug-related crimes; (2) intimidation of law abiding citizens by the expansion of a street gang presence in public places; (3) control by criminal street gangs over certain areas of the city through loitering and intimidation in those areas; (4) gang maintenance of such control while loitering, even in the presence of the police, caused by suspension of other criminal activity upon arrival of the police; (5) threats to persons and property in such areas from loitering criminal street gangs; (6) an interest in discouraging others from loitering with members of such gangs; and (7) a need for aggressive action to preserve the city's streets and public places for the safe use of the public. See preamble to Substitute Ord. adding § 8-4-015 to Chicago Muni. Code.

"The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). No reason appears for applying any different rule to these findings of the Chicago City Council concerning the impact of criminal street gang loitering in the public areas of the city. If accepted, these findings of the city council justify the Illinois Supreme Court's agreement with the need to abate the problem thus presented. See *City of Chicago* v. *Morales*, *supra*, 687 N.E.2d at 64.

The problem extends beyond the safety of law-abiding citizens victimized by the gangs. A group that includes a gang member itself is a prime target for the infliction of violence by a rival gang. See, *e.g.*, *Gutierrez* v. *Superior Court*, 24 Cal.App.4th 153, 156, 29 Cal.Rptr.2d 376 (1994); cf. *People* v. *Rand*, 37 Cal.App.4th 999, 44 Cal.Rptr.2d 686 (1995); but see *People* v. *Franco*, *supra*, 24 Cal.App.4th at 1534. Researchers in a 1996 St. Louis study "found most gang violence, including homicides, to be 'expressive,' retaliatory, or situationally spontaneous":

> "Although some violence was related to protecting drug turf and disciplining customers, most erupted over seemingly petty acts--disrespecting gang colors, stepping in front of another person, flashing gang hand signs, or driving through a rival neighborhood. 'Whatever the "purpose" of violence, it often leads to retaliation and revenge creating a feedback loop where each killing requires a new killing' [citation]." J. Howell, *op. cit. supra*, 12.

See, *e.g.*, *People* v. *Muniz*, 16 Cal.App.4th 1083, 1085-1086, 20 Cal.Rptr.2d 460 (1993) (gang member on his way to do pay back shooting with no particular victim in mind). In a 1996 Chicago study, researchers found "a 'marauder' pattern is common, in which members of rival gangs travel to the hub of their enemy's territory in search of potential victims." J. Howell, *op. cit. supra*, 14.

Thus, the Chicago ordinance's requirement that police disperse a *loitering* group that includes a criminal street gang member

protects public safety, even where the group also includes a relative of the gang member, or a social worker assigned to work with gangs. See, *e.g.*, *People* v. *Magana*, 17 Cal.App.4th 1371, 1374, 22 Cal.Rptr.2d 59 (1993) (killing of gang member's 7 yr. old son leads to retaliatory gang shooting of infant and others). Such a loitering group, and nearby innocent bystanders, *will* be at greater risk than a similar group (and bystanders) that includes no such gang member. In this light, the Chicago City Council's legislation rationally attacks the problem recognized by the Illinois Supreme Court, but which that court evidently felt the Constitution rendered the city council powerless to address.

V. THE NEED TO ABATE THE GANG MENACE JUSTIFIES SPECIAL LIMITATIONS ON LOITERING WITH CRIMINAL STREET GANGS

In *Griffin* v. *Wisconsin*, *supra*, 483 U.S. 868, the Court wrote of "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." 483 U.S. at 873-874. Speaking of probation, the Court said, "Recent research suggests that more intensive supervision can reduce recidivism," *id*. at 875, and that such supervision "is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Ibid*. The loitering criminal street gang, as defined in § 8-4-015(c)(2) of the Chicago ordinance, also creates a special need, justifying police interdiction before the ripening of normal probable cause that would validate an arrest. The special need here is to protect from violence not only the gang member but innocent bystanders, see pt. IV, *ante*, and to encourage law-abiding citizens to retake the city's public places.

The ordinance requires the police neither to search nor to arrest, but rather to order dispersal and removal of the loitering group. The rights implicated in Chicago's ordinance, if any, are those "not mentioned in the Constitution or in the Bill of Rights." *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S.

at 164. The state's intrusion on protected rights being non-existent, or at least substantially less than that involved in a search or arrest, the accompanying burden on the state is accordingly less to justify the officer's order. Cf., *e.g.*, *Michigan Dept. of State Police* v. *Sitz*, *supra*, 496 U.S. at 450, 455; *Veronia School Dist. 47J* v. *Acton*, 515 U.S. 646, 673, 115 S.Ct. 2386, 132 L.Ed.2d 564, (1995), dis. opn. of O'Connor, J. (police cannot "subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime"). Chicago has a compelling interest in intervention before the publicly loitering gang further damages the neighborhood or becomes itself a target of violent criminal activity (as in, *e.g.*, *People* v. *Flores*, 7 Cal.App.4th 1350, 1354-1355, 9 Cal.Rptr.2d 754 (1992) (gang shooting of "some guys" from a rival gang standing by a house). Cf. *Griffin* v. *Wisconsin*, *supra*, 483 U.S. at 879 (normal constitutional requirements yield to need to prevent damage to probationer or society).

In *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S. at 171, the Court described as too extravagant an implicit presumption, resulting from enforcement of the Jacksonville vagrancy ordinance there under consideration, "that crime is being nipped in the bud." *Ibid*. The ordinance, as described by the Court, allowed arrest and prosecution merely of "people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police." *Ibid*. The Court's concern appears to have been that the Jacksonville ordinance was incapable of "even-handed administration," *ibid*., such that minorities and the poor would bear the brunt of its enforcement. See *ibid*.

But while the Court described the implicit presumption associated with the Jacksonville ordinance as "too extravagant to deserve extended treatment," *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S. at 171, the presumption underlying the Chicago ordinance--that loitering members of criminal street gangs and their associates create a serious social problem that encourages and depends upon public criminality--is too *clear* "to deserve

extended treatment." *Ibid.* A successful prosecution under the ordinance depends upon (1) the actual presence of a member of a criminal street gang in the loitering group, see Chicago Muni. Code, § 8-4-015(b); and (2) the *refusal* to obey a police dispersal order, see *id.*, § 8-4-015(a). While under the Jacksonville ordinance, the target's choice of an idle etc. (but non-criminal) lifestyle may have affected police enforcement, recognition of (1) the *criminal* lifestyle of the Chicago ordinance's primary targets, that is, those whom the police must reasonably believe to be members of criminal street gangs; (2) the constitutionally unprotected purposes for which they congregate in public places, and (3) the violence their loitering provokes from rival gangs constitutionally justify enforcement of the Chicago ordinance.

VI. THE CHICAGO ORDINANCE OFFERS BENEFITS BEYOND THOSE OF ANTI-GANG INJUNCTIONS

The California Supreme Court has approved the use of injunctions to curb certain ostensibly non-criminal activities of criminal street gangs as public nuisances. *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th 1090. The use of such power depends upon a showing of a particular actual or threatened interference with property or rights. See *id.*, at 1107, discussing *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895).

> "Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs *or* prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public." *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1108-1109.

A judicial injunction "does not embody the broad and abstract commands of a statute." *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1114. "Instead, it is the product of a concrete

judicial proceeding prompted by particular events," *ibid.*, usually requiring aggressive litigation and issuing thereafter. *Ibid.* The California Supreme Court related some of the evidence in *Gallo*, as follows:

> "One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police; she stated that other residents had been threatened as well. Another resident reported her neighbor's property had been vandalized and the resident threatened after complaining to police that gang members had urinated in her garage. A police officer declared Rocksprings residents had told him gang members confront and threaten them with physical violence when asked to leave residential property. Others refused to furnish declarations, fearing for their lives if any gang member should discover their identities." *Id.* at 1118-1119.

These recitations illustrate an obvious weakness of the injunctive process in comparison with the Chicago ordinance. In California, the residents of the Rocksprings neighborhood had to suffer without relief before and while San Jose authorities litigated injunctive relief against the gang. San Jose will have to seek a new injunction if the enjoined gang merely moves its activities to the streets of another neighborhood. Even within a neighborhood, new recruits to a gang or gang members otherwise unidentified in the injunction may take the place of the enjoined members.

Furthermore, just as the delay inherent in obtaining a probable cause warrant contributed to departure from the usual warrant requirement in the search situation described in *Griffin* v. *Wisconsin*, *supra*, 483 U.S. at 876, so also the injunction process falls short in the need to promptly disperse an already menacing criminal street gang. Finally, this Court (and, hence, also lower courts) may scrutinize an injunction more closely than an ordinance. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764-766, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

However, the injunction can supplement the effect of an ordinance like Chicago's. For example, while a police order under the ordinance might disperse a loitering group of gang members and associates, violation of an injunction might justify an arrest of a dispersing gang member. An injunction may "afford more precise relief." *Madsen* v. *Women's Health Center, Inc.*, *supra*, 512 U.S. at 765. No reason appears why the government should be limited to one or the other.

CONCLUSION

The Chicago ordinance is constitutionally selective in its targets; gang violence is not. The Court should reverse the judgment of the Illinois Supreme Court finding the Chicago ordinance unconstitutional.

Respectfully submitted,

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June 16, 1998